

206. Certainly, if location and profitability are not considerations, one would expect that Adams could have found a station, perhaps one in financial difficulty, that it could purchase outright for a “bargain price.” Yet, Adams made no effort, whatsoever, even to determine whether a “bargain price” station might be for sale. It is inconceivable that, if it truly wanted to obtain a television station at a “bargain price”, Adams, knowing full well the vagaries of the comparative renewal process and the historically low record of success by overfilers [Gilbert Testimony, Tr. 1013:16-17], would undertake the significant risks, uncertainties, and costs involved in the comparative renewal process without at least looking into the possibility of buying a station outright. The only reasonable explanation for not first looking to buy a station is that obtaining a station is not and never has been Adams’ primary purpose; Adams’ recent claim to such purpose is clearly without credibility. Rather Adams’ actions suggest that Adams decided that a comparative renewal challenge was a no-risk proposition because Adams could, as indicated in its retainer agreement with B&C, expect to reach an “economically favorable” settlement that would, at least, reimburse Adams’ expenses. [See Adams’ Fee Agreement (Reading Ex. 21); Gilbert Testimony, Tr. 1019:19 – 1020:19]

207. In addition, Adams’ claim that it pursued the comparative renewal process because the cost of obtaining a station through that process would invariably be less than the value of the station which could be obtained

is, itself, suspect. Thus, Adams never sought to appraise or value WTVE (or Adams' initial target, WHSH in Marlborough, Massachusetts), prior to filing its application. [Gilbert Testimony, Tr. at 1065:21-1066:9; 2530:17-19] Nor did Adams solicit a sales price from Reading (or from the owner of WHSH), prior to filing its application. [Gilbert Testimony, Tr. at 2530:13-22, 2541:19-25] Thus, there is simply no factual support for Adams' claim that it would be less expensive to acquire WTVE, or any other station, through the comparative renewal process rather than through outright purchase of the station. Without having done an investigation into the value of WTVE and the cost to purchase it outright versus the cost of litigation (with the attendant risk of losing on the merits), Adams' claim that engaging in the comparative renewal process would result in obtaining WTVE at a bargain price is baseless speculation at best and post hoc rationalization, at worst. Again, if this truly were Adams' motive, then Adams presumably would have targeted the most valuable home shopping station, instead of just taking the luck of the draw to challenge the next home shopping station coming up for license renewal, particularly one that had recently been in bankruptcy. [Gilbert Testimony, Tr. 1110:13-16, 1123:9-1124:2]

208. Finally, and perhaps most significantly, if, as it now claims, Adams filed its application for the primary purpose of obtaining a television station at a "bargain price," why did it abandon Channel 44 in Chicago? Thus, as of September 1992, the Adams principals (conducting their business

as Monroe Communications) were the prevailing applicants for Channel 44 in Chicago – a station worth in excess of \$50 million. [Gilbert Testimony, Tr. 1003:18-1005:4, 1130:22-1131:2] Monroe, however, after more than a decade of litigation and with only Video 44's appeal left to contend with, gave up its pursuit of that television station license in exchange for a "huge sum of money" without ever operating the station. [Gilbert Testimony, Tr. 1007:3-4, 1130:11-25, 2516:19-2517:7; Gilbert Decl., ¶¶ 5-6]

209. Almost immediately thereafter, however, Adams began its pursuit of a "home shopping" station to challenge. [Gilbert Testimony, 1114:2-6, 2471:13-2474:7; Joint Request for Approval of Settlement Agreement, Dismissal of Monroe Application and Grant of Video 44 Application (Reading Ex. 19); Order, FCC 92I-097, released December 24, 1992, approving the Monroe Settlement Agreement (Reading Ex. 22); Letter from Cole to Gilbert dated July 16, 1993 and enclosing list of television stations licensed to subsidiaries of the Home Shopping Network (Adams Ex. 66)] As noted above, in this proceeding, Gilbert testified that Monroe had been "highly successful" from his point of view, even though Monroe never operated the station in Chicago. [Gilbert Testimony, Tr. 1116:3] This testimony makes it clear that owning and operating a station was not Adams' goal.

210. Adams/Monroe claims that it settled the Video 44 case because Univision would not deal with them and Telemundo was in financial trouble,

leaving Monroe without a source for its proposed Spanish language programming. [Gilbert Testimony, Tr. 1007:13-1009:9, 1127:18-1131:13] However, Adams claims that it planned to air Spanish language programming in Reading [Gilbert Testimony, Tr. 1125:1-1127:8; Fickinger Testimony, Tr. 2441:18-2445:21], yet Adams never investigated the availability of Spanish language programming in Reading. [Gilbert Testimony, Tr. 1107:11-14; Haag Testimony at 17:3-18 (Reading Hearing Ex. 44)] Having just been frustrated in its plans to go on the air in Chicago due to the unavailability of Spanish language programming – which purportedly forced it to sacrifice a \$50 million station for a paltry \$17 million – Adams/Monroe presumably would have learned the costly lesson about the need to assure itself of programming in connection with a renewal challenge. But while Adams/Monroe claims that it had the same programming plans for Channel 51 in Reading that it had for Channel 44 in Chicago, it inexplicably has never investigated the availability of Spanish-language programming in Reading.

211. Adams' initial claim of being on a public service crusade against home shopping programming is, itself, without credibility for several reasons. First, the Commission had recently decided that home shopping programming serves the public interest in a decision Adams knew about. From the outset, then, the "crusade" was focused on an unlikely target. Second, Adams/Monroe never even bothered to file comments in the

Commission's home shopping proceeding or seek a reversal of that decision. It strains credulity to believe that Adams was so exercised over the issue that it would embark on the type of crusade it described but not bother to file comments in the rulemaking or seek a reversal of the decision reached in the rulemaking. Third, the timing of Adams' formation suggests that Adams' principals were hoping to replicate the successful financial outcome of the Monroe case. In particular, Adams' retainer agreement with B&C (signed in 1999 but reflecting an agreement in place from the outset) indicates that the prospect of reaching an "economically favorable" settlement was very much on the minds of Adams and its counsel. Finally, Adams was not even sufficiently familiar with home shopping programming to distinguish between a cable home shopping channel and WTVE's on-air programming. If Adams were willing to spend years locked in a costly legal battle over home shopping programming as a public interest issue, it is reasonable to expect that it would understand this type of fundamental distinction.

212. Even if the Commission were to accept Adams' explanation that it was on a public interest crusade for an FCC decision adverse to home shopping programming as either Adams' primary or secondary motivation, then Adams' application constitutes an abuse of process. Commission case law makes it clear that an application constitutes a "strike application" when the underlying intent for the application, either in whole or in part, involves a purpose other than to own and operate the proposed station. Prevention of

Abuse of the Renewal Process, supra; Garden State, supra; Millar v. FCC, supra; Capitol Broadcasting Co., supra; Blue Ridge Mt. Broadcasting Co., supra. Accordingly, by Adams' own explanation, this application represents an abuse of process.

213. Adams' revised claim that its sole purpose was to obtain the Channel 51 broadcast license is, at best, without credibility and, at worst, false and misleading. Moreover, as demonstrated below, the remaining evidence of Adams' intent does not demonstrate a primary interest in owning the television station in Reading, Pennsylvania.

**b. The remaining evidence of Adams' intent does not demonstrate a primary interest in owning Channel 51 in Reading, Pennsylvania.**

214. That Adams did not file its application with a bona fide intent to own and operate Channel 51, Reading, Pennsylvania, is further demonstrated by an examination of the remaining evidence.

**i. Adams' lack of a legitimate interest in Channel 51, Reading, Pennsylvania, is inconsistent with an intent to own and operate that station.**

215. The evidence plainly shows that Adams has no legitimate interest in owning a television station in Reading, Pennsylvania. Thus, none of the Adams principals are from Reading, Pennsylvania, or have ever lived in or around Reading, Pennsylvania. [Adams' Application (Reading Ex. 10 at

5-8); Gilbert Testimony, Tr. 1067:2-4] Nor does Adams have an interest in public service broadcasting in Reading, Pennsylvania, beyond its purported interest in public service broadcasting in general. [Gilbert Testimony, Tr. 1019:19-22; see also Tr. 1119:17-18 ("This isn't a great place to be, Reading. It's hard to get to, all kinds of things.")]

216. Moreover, Adams was not formed for the purpose of mounting a challenge for Channel 51, Reading, Pennsylvania, but rather for the purpose of challenging the first "home shopping" station whose license was up for renewal, without regard to its location or value. [Gilbert Decl., ¶ 7 (Reading Ex. 24); Gilbert Testimony, Tr. 1119:7-1124:9, 2471:10-16, 2473:15-2474:7; Letter from Cole to Gilbert dated July 16, 1993 (Adams Ex. 66 at 1-2)] In fact, Channel 51 in Reading, Pennsylvania was not even Adams' first choice of targets. Adams originally sought to challenge Channel 66 in Marlborough, Massachusetts. [List of full-power television stations licensed to subsidiaries of the Home Shopping Network (Adams Ex. 66 at 2); Gilbert Testimony, Tr. 2474:8-18] To that end, Adams incorporated in Massachusetts and enlisted a local resident, Elinor Woron, as a shareholder owning a minor interest. [Articles of Organization (Reading Ex. 71); Gilbert Testimony, Tr. 996:18-232474:8-10; 2517:8-10] Adams only decided to challenge WTVE after it failed to locate a suitable transmitter site in Massachusetts, and only then because WTVE was the next "home shopping" station to come up for license

renewal. [Gilbert Testimony, Tr. 1042:11-21, 1123:15-1124:2, 2475:21-2475:11, 2476:12-18, 2478:15-17]

- ii. Adams' failure to make a legitimate effort to evaluate WTVE's programming before it filed its application is inconsistent with an intent to own and operate Channel 51.

217. Although Adams takes the position that home shopping programming generally does not serve the public interest, it concedes that a home shopping station could still provide sufficient other local programming and public service to serve the public interest. [Gilbert Testimony, Tr. 1060:14-19, 1041:20-1042:5, 2468:9-2469:5, 2473:15-20, 2497:22-2498:6] Nevertheless, Adams made no credible effort to evaluate WTVE's programming prior to filing its application. Thus, no one on behalf of Adams actually viewed WTVE's programming prior to Adams' filing its application. [Gilbert Testimony, Tr. 1064:24-1065:1] Although Adams understood that every television station has to make its public inspection file available to interested parties [Gilbert Testimony, Tr. 1011:18-21], Adams did not review WTVE's public inspection file to determine what public service programming the station was airing. [Gilbert Testimony, Tr. 2541:16-18] Nor did Adams retain an expert or a consultant to evaluate WTVE's programming. [Gilbert Testimony, Tr. 2540:19-22]<sup>27</sup>

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<sup>27</sup> Gilbert's failure to even watch WTVE during one of his visits to Reading or to review WTVE's public inspection file is simply mind-boggling, given his past experience challenging a station's renewal application.



218. In fact, Adams' entire programming evaluation effort consisted of Gilbert's personal, informal survey of 30 to 40 people in Reading, his conversations with Paul Sherwood, a computer systems consultant, and Gilbert's alleged review of some video tapes prepared by Mr. Sherwood. [Gilbert's Testimony, Tr. 2475:21-2476:11; 2476:19-2477:1, 2478:15-17, 2483:13-2484:10, 2538:7-17, 2539:3-5; Sherwood Testimony, Tr. 2137:11-16, 2139:11-15; 2149:2-16, 2154:17-2156:1] As demonstrated below, these very minimal efforts were undertaken without any serious diligence and, as a result, were wholly ineffective.

(a) Gilbert's survey

219. Between February and June 1994, Gilbert, on behalf of Adams, made 3 or 4 trips to Reading. [Gilbert Testimony, Tr. 2475:21-2476:11, 2476:19-24, 2478:15-17, 2538:7-14] During these trips, Gilbert informally interviewed 30 to 40 people. [Gilbert Testimony, Tr. 2476:19-2477:1, 2538:15-17]<sup>28</sup> The interviews were conducted solely at business establishments, including malls and restaurants. [Gilbert Testimony, Tr. 2538:18-20] Gilbert did not conduct any interviews at peoples' homes. [Gilbert Testimony, Tr.

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<sup>28</sup> Gilbert did not ask the names of the people he interviewed and nor did he took any notes or make any written record of the interviews [Gilbert Testimony, Tr. 2538:25-2539:5]. As a result, the veracity of Gilbert's claim to have conducted such interviews and, if conducted, their content, is unverifiable.

2538:21-24] None of the people Gilbert interviewed was aware of WTVE.  
[Gilbert Testimony, Tr. 2539:6-10]

220. This survey, however, does absolutely nothing to advance Adams' claim that it filed its application because it believed that WTVE's programming was insufficient to serve the public interest of the Reading community. Thus, Gilbert's survey is defective as a means of determining WTVE's public service in that:

- There is no indication that any of the people Gilbert interviewed were actually from the WTVE viewing area or received WTVE via cable;
- The interviews were conducted at business establishments, including malls and restaurants, not at peoples' homes; thus, the pool of interviewees was comprised of those people *least* likely to view "home shopping" programming (i.e., those who could and did use retail shopping outlets), rather than those most likely to view "home shopping" programming;
- The scope of the survey, 30-40 people, comprised less than 1/1000th of a percent of the population that Adams proposed to serve. [Adams Application (indicating a population of 4,066,085 within the proposed service area according to the 1990 Census) (Reading Ex. 10 at 30)];
- It is not clear that Gilbert even knew WTVE's call sign or understood the distinction between WTVE's signal and Home Shopping Club

service distributed via cable, so it is not known if he was able to ask meaningful questions about WTVE. [Section (c) below and Letter from Gilbert to Swanson, dated April 22, 1999 (Reading Ex. 57) (describing WTVE as "Station WNET (T.V.) in Redding, Pennsylvania")]; and

- Finally, according to Gilbert, none of the people he spoke to ever viewed WTVE; as a consequence, they cannot have provided him with any insight into WTVE's programming.

(b) Sherwood's reports

221. Adams also claims to have based its determination of WTVE's public service programming on reports Gilbert received from Sherwood. Adams' reliance on reports from Sherwood as a basis for evaluating WTVE's public service is misplaced. Thus, Sherwood was, and remains today, a computer systems consultant. [Sherwood Testimony, Tr. 2137:11-16] He is not, and never has been, a professional media consultant, nor does he have any expertise in analyzing or evaluating the content of television programming or the public service performance of television stations. [Sherwood Testimony, Tr. 2149:22-2150:14]

222. In any case, Adams' testimony with respect to Sherwood's "reports" lacks credibility. Thus, in his November 22, 1999 Declaration, Gilbert claims that "[a]s the taping project was on-going, I spoke regularly with the person who was in charge of making the tapes, and I was regularly briefed on the contents of the programming being taped." [Gilbert Decl., ¶

12] In Gilbert's January testimony, however, "regularly" became "daily."  
[Gilbert Testimony, Tr. at 1069:13-21]

223. In June, Gilbert then recanted his January testimony that he spoke to Sherwood on a daily basis and, instead, claimed that he had spoken with Sherwood a couple of times a week.

Mr. Cole: Now, back in your January testimony, I believe you testified that you spoke with Mr. Sherwood every day or on a daily basis during the taping.

Do you recall that testimony?

Mr. Gilbert: Yes.

Q: Do you have any reason to wish to revise that testimony?

A: Yes, sir. It is my understanding that I really didn't talk to him every day. I talked to him a couple of times a week.

Q: Prior to your testimony in January, had you reviewed in detail any records concerning the taping process involving Mr. Sherwood?

A: No.

Q: So was the basis for your January testimony?

A: Once again, it was my recollection of what had occurred six years prior.

Q: Since then have you had the opportunity to review other information concerning the taping process?

A: Yes, I have, and that information leads me to revise my answer.

[Gilbert Testimony, Tr. 2492:10-2493:5] The "other information," however, turned out to be Mr. Sherwood's deposition testimony.

Mr. Southard: Well, Okay. How did it come up that you changed your testimony from the – the first testimony, if I recall correctly, was that you spoke to [Mr. Sherwood] on a daily basis to your current testimony.

Mr. Gilbert: Oh, I saw his deposition.

Q: Okay, so you changed your testimony based on Mr. Sherwood's deposition?

A: Yes.

[Gilbert Testimony, Tr. at 2549:13-20]

224. Contrary to Gilbert's testimony, Sherwood testified that, to the best of his recollection, he spoke to Gilbert once after having done the initial June 1, 1994 recording and then only once during the process of making the remaining videotapes. [Sherwood Testimony, Tr. 2149:2-16]

225. Gilbert's testimony, based as it is on Sherwood's testimony rather than any apparent independent recollection by Gilbert, raises serious questions as to the veracity of his prior testimony – e.g., that he spoke to Mr. Sherwood on a daily basis – and, for that matter, on his present testimony that he spoke with Mr. Sherwood “a couple times a week.”

(c) Gilbert's alleged review of the videotapes

226. Adams also claims to have based its determination of WTVE's public service on Gilbert's personal review of the videotapes he received from Sherwood. Adams' reliance on Gilbert's alleged review as a basis for evaluating WTVE's public service is misplaced for the simple reason that the

tapes are not of WTVE's programming, a fact which Gilbert now admits is "painfully evident." [Gilbert Testimony, Tr. 2477:14-2478:12]

227. Not only is Adams' reliance on the Sherwood video tapes misplaced because the tapes are not of WTVE, but that error resulted from Adams' failure to retain a broadcasting expert and failure to specifically instruct Sherwood, knowing that he was not a broadcasting expert. Thus, to the best of Sherwood's recollection, Gilbert's initial instructions to were to tape the "home shopping channel." [Sherwood Testimony, Tr. 2139:11-2140:8] In fact, to the best of Sherwood's recollection, Gilbert never even mentioned WTVE or Channel 51. [Sherwood Testimony, Tr. 2139:16-2140:8] Nor did Gilbert ever tell Sherwood the precise purpose for which the tapes were needed. [Sherwood Testimony, Tr. 2144:6-11, 2145:10-20, 2146:13-17] Gilbert's claim that he did very specifically instruct Sherwood to tape WTVE, Channel 51, and confirmed with him his ability to receive Channel 51 is not only contrary to Sherwood's recollection but belied both by the fact that Sherwood did not tape Channel 51 and by the fact that his cable company from which he did the taping did not even carry WTVE. [Sherwood Testimony, Tr. 2138:23-2139:1, 2147:7-2148:4, 2157:5-15; TV Times from the Reading Eagle for the week of May 29 to June 4, 1994 (Adams Ex. 11)]

228. Adams' lack of diligence in failing to retain an expert to evaluate WTVE's programming and then further failing to properly instruct Sherwood

as to what was to be taped, undercuts Adams' claim to a bona fide belief that WTVE's programming was not serving the public interest.

229. In addition, Adams' claim that Gilbert reviewed the videotapes and believed them to be of WTVE's programming itself lacks credibility. Gilbert has given various, differing, accounts of his alleged review of the videotapes. At the outset, Gilbert did not even claim that he reviewed the tapes, but relied only upon the reports he had from Sherwood. Specifically, in his November 22, 1999, Declaration, Gilbert states:

. . . I retained a number of individuals under the direction of a single individual to videotape, prior to the filing of Adams' application, the programming of Station WTVE(TV) for two weeks, 24 hours per day, seven days per week. As that taping project was on going, I spoke regularly with the person who was in charge of making the tapes, and I was regularly briefed on the contents of the programming being taped. The information which I obtained through those reports strongly confirmed my belief that the station was not serving the public interest.

[Gilbert Decl., ¶ 12 (Reading Ex. 24)] At no point in the Declaration does Gilbert even hint that he reviewed the tapes.

230. In contrast, however, at the hearing in January, Gilbert testified that he did, in fact, personally review the Sherwood tapes. [Gilbert Testimony, Tr. 1068:7-11, 1083:18-1085:20, 1088:3-1089:1]<sup>29</sup> Specifically, after having claimed to have reviewed all the tapes, Gilbert explained:

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<sup>29</sup> In particular, Gilbert stated:

The Court: All right. At what point in time did you decide and say okay, I've seen enough?

Mr. Cole: Did you review those tapes in real time or in some other mode?

Mr. Gilbert: In fast forward.

Q: So you didn't sit there and watch hour for hour all the tapes?

A: I watched all the tapes and all the transmissions, but I – I learned how to – Particularly, I didn't articulate or realize until I heard the – There was a way we knew that the PSA was coming. I'll just qualify or articulate. There was this music that would come in front of the PSA. That's how we stopped the fast forward.<sup>30</sup>

Q: And Your Honor, this is not a question but I think you clarified it on –

A: I did some fast forward, some real time. Just to get the flavor of the sales pitch.

[Gilbert Testimony, Tr. 1134:25-1135:14]

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Mr. Gilbert: I never said I saw enough. I watched every transmission. This was part of like belt and suspenders, Your Honor.

Q: You said two weeks, though –

A: Yeah.

Q: Two weeks, 24 hours a day.

A: I watched it all. It was not exactly fun.

[Gilbert Testimony, Tr. 1088:17-1089:1]

<sup>30</sup> Gilbert's claim to have reviewed the tapes, in part, by "listening" to the audio during those times when he allegedly reviewed the tapes in "fast forward" mode is patently false. [Gilbert Testimony, Tr. 1134:11-1135:14, 2539:15-2540:5] Specifically, using a standard VHS video player / recorder as Gilbert claims he did, it is simply not possible to hear the audio during fast forward review.



231. In his January testimony, Gilbert also claimed that he believed the videotapes were of WTVE's programming because they contained "Reading, PA PSAs":

The Court: Well these are just Reading PSAs that were run by a variety of stations in Reading? When we're talking about Reading PSAs, I thought you meant the ones that the station was running?

Mr. Gilbert: As far as I -- They were Pennsylvania PSAs, its been awhile since I looked at them. And they were Pennsylvania, and as I recall they were Reading, PA PSAs.

Mr. Hutton: What do you mean by Reading, PA PSAs?

Mr. Gilbert: They had to do with -- First off, they were rudimentary. They had to do with Pennsylvania problems, and as I recall they had to do, occasionally there was a mention of Reading.

[Gilbert Testimony, Tr. 1085:7-20; see also Tr. 1083:2-3 ("The public service on [the tapes] Your Honor, was from Reading.")]

232. Reading's Assistant General Manager, George Mattmiller, testified in June, however, that the only PSAs on the Sherwood tapes were those produced for national consumption by the Missing Children Help Center located in Tampa, Florida, that none of the missing children identified in those PSAs were identified as being missing from Reading, Pennsylvania, and that, in the approximately 392 hours of recorded programming, only one of the children was identified as having gone missing from the Philadelphia-Wilmington-Atlantic City combined Metropolitan Statistical Area.

[Mattmiller Testimony, ¶¶ 1, 9-15 (Reading Hearing Ex. 47)] Thus, it appears that Gilbert was simply making up his January testimony as he went along, in an effort to rationalize his failure to recognize that the videotapes were not of WTVE's programming

233. In June, however, Gilbert narrowed the scope of his review:

Mr. Cole: So you received the tapes from June 1.  
What did you do next?

Mr. Gilbert: Viewed them. Put them in machines in our office; sat down and watched the tapes.

Q: What did you see on the tapes?

A: Well, I saw 24 hours of programming, and strangely enough, in light of what happened, on the first six-hour segment, which is the one I watched most intensely, there were three Pennsylvania public service announcements. They were really dealing with missing children.

[Gilbert Testimony, Tr. 2487:13-22]

234. Gilbert's most recent emphasis on the first six hours of the Sherwood tapes, revised down from his prior claims of 24 to 36 hours, was most certainly done in an effort to draw support for his claim that he believed that the tapes were of WTVE's programming by referencing the three Pennsylvania missing children PSAs identified by Mr. Mattmiller:

Mr. Cole: What did you understand to be the importance of the fact that the missing children from Pennsylvania were on the tape that you were watching?

Mr. Gilbert: It indicated that I was watching a Reading program.

[Gilbert Testimony, Tr. 2487:25-2488:4]

235. Gilbert then attempted to support his testimony of having seen "Pennsylvania" PSAs by reference to Mattmiller's written testimony. Thus, Gilbert testified:

Mr. Cole: If I could refer you, Mr. Gilbert, to Attachment E to Mr. Mattmiller's exhibit, that is Reading Exhibit 47, Attachment E, which is a listing of the breakdown of missing children announcements according to groups, and I believe we previously understood among the parties that Group A as defined on or as set forth on the top of this exhibit refers to the June 1 tapes.

Would you confirm that three of the missing children announcements in the first taping Group A is Pennsylvania?

Mr. Gilbert: That's correct.

Q: That's consistent with your recollection, is it not?

A: Yes.

[Gilbert Testimony, Tr. 2496:16-2497:4]

236. On cross-examination, however, Gilbert reluctantly conceded that he had no *actual* recollection of seeing those PSAs:

Mr. Southard: You testified that you saw three missing children PSAs that were about Pennsylvania; is that correct?

Mr. Gilbert: Correct.

Q: Is that something that you actually remember today as you sit here?

Pause.

Do you have an actual recollection of seeing those PSAs at the time that you reviewed the tape?

A: No, not today.

[Gilbert Testimony, Tr. 2540:6-14] Thus it appears that Gilbert's most recent justification of having reviewed the videotapes but failed to recognize that they were not of WTVE is based wholly on Mattmiller's summary of the tapes and not on any actual recollection, despite the initial claim to such recollection.

237. Gilbert's convenient conclusion that he believed the tapes were of WTVE's programming based on the three "Pennsylvania" PSAs is also dubious in light of the fact that, in that first six hour tape Gilbert claims to have "watched most intensely" there were four PSAs for children missing from Florida (which is where the programming did, in fact, originate). [Mattmiller Testimony (Reading Ex. 47 at E1)]

238. Moreover, Gilbert claims to have watched all of the PSAs in "real time." [Gilbert Testimony, Tr. 1134:25-1135:14, 2491:17-2492:1] That being the case, it is hard to understand how Gilbert could have reached the conclusion that he was watching "Reading, PA PSAs." While he claims that the three "Pennsylvania" PSAs led him to believe that the tapes were of WTVE, there were actually four PSAs for children missing from Florida in the first six-hour tape and 20 such PSAs overall. In addition, four PSAs for

children missing from Texas were included in the first 24 hours taped, out of 12 such PSAs overall, and 26 PSAs, overall, were for children missing from New York. [Mattmiller Testimony at E1-E4 (Reading Ex. 47)]<sup>31</sup> The instances of so many PSAs for children missing from states other than Pennsylvania (only 9 of the 131 PSAs were for children missing from Pennsylvania, and none of them from Reading) cast serious doubt on the veracity of Gilbert's claim that he reviewed the tapes in full and saw "Reading, PA PSAs" on those tapes.

239. Gilbert's further efforts to reconcile the fact that the Sherwood tapes were not of WTVE's programming with his claim that he actually reviewed them simply serves to weaken his claim. Thus, had Gilbert in fact reviewed the tapes, certainly he would have noticed the lack of any identification of WTVE or any paid advertising. [Mattmiller Testimony, ¶ 5-6 (Reading Ex. 47)] Gilbert has tried to explain his failure to notice the lack of station identifications for WTVE by asserting that he was "focused on the timing of the PSAs and the nature of the PSAs and the fact that they were canned and so on." [Gilbert Testimony, Tr. 1078:21-25] However, in light of the complete lack of any PSAs relating to Reading, that explanation is not believable.

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<sup>31</sup> In sum the PSAs are for children missing from NY(26 PSAs), FL(20), TX(12), PA(9), CO(8), IL(7), NC(7), AZ(6), CA(6), OH(6), WV(6), OK(5), MI(3), ND(2), WI(2), GA(1), ID(1), IN(1), MD(1), OR(1), and VA(1). [Mattmiller Testimony, E1-E4 (Reading Ex. 47)]

240. Moreover, if Gilbert's claim to having reviewed the videotapes and having believed them to be of WTVE's programming is to be credited, not only must the Commission overlook Gilbert's inconsistent testimony about the review process, accept his claim about the "Pennsylvania" PSAs, and accept his failure to notice the absence of WTVE station identifications or any paid advertising, but the Commission must also accept that Gilbert also failed to account for the hourly identifications of the programming as that of the "Home Shopping Club." As Mattmiller attested, at approximately 50 minutes after the hour, in addition to the PSAs (which Gilbert claims to have watched in "real time"), the tapes reflect "a five-second network identification of the Home Shopping Club consisting of the Home Shopping Club logo and the words 'Home Shopping Club' sung in a jingle." [Mattmiller Testimony, ¶ 7 (Reading Ex. 47)] In addition, the Commission would have to accept Gilbert's overlooking the longer, 30-second, identification of the Home Shopping Club, which aired in some, but not all, of the breaks, consisting "of a depiction of the Home Shopping Club logo, the words "Home Shopping Club" being sung to a jingle, and the following voiceover announcement:

You are watching America's original shop at home television service, bringing you 24 hours of savings, fun and excitement every day. Live from Tampa Bay, Florida, it's the Home Shopping Club.

[Mattmiller Testimony, ¶ 8 (Reading Ex. 47)]

241. Thus, it appears that even a cursory review of the Sherwood tapes would have, at the very least, raised questions about the origin of the programming recorded. Yet Gilbert claims that he reviewed all of the tapes and, not only did he not question the origin of the programming but he concluded therefrom that they were, in actuality, the programming of WTVE. Gilbert's testimony in this respect is not worthy of belief. What's more, in light of Gilbert's need to have reviewed the tapes in order to support his claim that, based upon such review, he concluded that Reading's programming was not serving the public's interest, there is ample motive for fabrication. The facts simply do not support Gilbert's claimed review and, at the least, raise grave doubts as to the credibility of Adams' purported review of WTVE's programming.

242. In sum, Adams' failure to undertake a good faith investigation of WTVE's public service programming before it filed its application further evidences Adams' lack of a bona fide intent to challenge WTVE for the ownership of the license to WTVE, Channel 51, Reading, Pennsylvania.

- (iii) Adams' casual efforts to secure and maintain the rights to a transmitter site are inconsistent with an intent to own and operate a television station.

243. Adams' lack of a bona fide interest in owning and operating Channel 51 in Reading, Pennsylvania is further demonstrated by its casual dealings with respect to securing and maintaining the rights to a transmitter

site. Thus, on June 29, 1994, Adams preliminarily offered to enter into an option for the prospective use of a transmitter owned by Conestoga Telephone & Telegraph Company ("Conestoga"). [Adams' Letter of Intent (Adams Ex. 68); Gilbert Testimony, Tr. 2480:11-22] Adams' Letter of Intent to enter into the option with Conestoga indicated Adams' desire to affix a UHF antenna to Conestoga's existing tower, and to occupy 500-600 square feet of an existing equipment building at the site. [Adams' Letter of Intent (Adams Ex. 68)] Conestoga subsequently advised Adams that any lease concerning the use of the Conestoga tower would be contingent on the ability to obtain proper zoning permits to construct an additional building or expand the existing structure. [Conestoga Letter dated August 8, 1996 (Reading Ex. 74)]

244. As of August 1996, however, more than two years after its Letter of Intent to Conestoga, Adams and Conestoga had *still* not come to an agreement regarding Adams' use of the proposed transmitter site. [Conestoga Letter dated August 8, 1996 (Reading Ex. 74)] Thus, by letter dated August 8, 1996, Conestoga advised Adams that "[a]t this point, we have no agreement whatsoever regarding this site." [Conestoga Letter dated August 8, 1996 (Reading Ex. 74); Gilbert Testimony, Tr. 2531:1-23] On August 21, 1996, Gilbert, on behalf of Adams, responded: "I am totally aware of the obligations stated in your letter of August 8, 1996. . . . Please forward me an executed copy of the Restated Option Agreement and License/Lease Agreement with the appropriate check and we can finally be on our way after



all the many, many years.” [Adams Letter dated August 21, 1996 (Reading Ex. 75); Gilbert Testimony, Tr. 2532:9-2533:5]

245. The Conestoga Option Agreement was finally executed in December 1996. [Adams Letter dated December 20, 1996, and Adams Check No. 1036 (Adams Ex. 71 at 1 and 3)] The 1996 Option Agreement was for a period of three years to begin with delivery of the executed agreement and payment to Conestoga. [Option Agreement, ¶ 1(A) (Adams Ex. 69 at 2)] Adams delivered the executed Option Agreement and payment to Conestoga under cover of a letter dated December 20, 1996. [Adams Letter dated December 20, 1996, and Adams Check No. 1036 (Adams Ex. 71 at 1 and 3)]

246. The Option Agreement, however, was not renewed or extended during its effective term and on or about December 20, 1999, the Conestoga Option Agreement expired by its own terms. [Option Agreement, ¶ 1(A) (Adams Ex. 69 at 2); Adams Letter dated December 20, 1996, and Adams Check No. 1036 (Adams Ex. 71 at 1 and 3); Gilbert Testimony, Tr. 2535:18-24; Adams Check No. 1080 (Reading Ex. 76)] On May 17, 2000, shortly before the Phase III hearing, Adams sought to renew its option for the prospective use of the Conestoga tower. [Gilbert Testimony, Tr. 2535:18-24; Adams Check No. 1080 (Reading Ex. 76)]

247. Adams’ lack of diligence in waiting more than two years before formalizing its right to use the Conestoga transmitter tower and in subsequently allowing that right to lapse is inconsistent with a bona fide